

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COSTCO WHOLESALE CORPORATION, a
Washington corporation,

Plaintiff,

v.

ROGER HOEN, VERA ING, and MERRITT
LONG, in their official capacities as members
of the Washington State Liquor Control Board,

Defendants,

and

WASHINGTON BEER AND WINE
WHOLESALE ASSOCIATION, a
Washington non-profit corporation,

Intervenor Defendant.

NO. CV04-0360P

**COSTCO'S SUMMARY OF
TESTIMONY IN FIRST WEEK OF
TRIAL**

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SUMMARY OF TRIAL WITNESS TESTIMONY

The time the testimony was given is noted where it was recorded.

Lorraine Lee, LCB regulatory director

1. There is no state policy to increase prices to reduce consumption. 3/21/6 at 2:43 p.m.
2. The LCB does not seek to promote temperance through enforcement of the restraints.
 - "The term temperance is not in our daily lexicon." 3/21/6 at 2:09 p.m.
 - When asked what tools the LCB has to address overconsumption, Lee did not include the restraints. Instead, she responded that the division has enforcement officers out in the field visiting retail licensees to ensure the license operator is not serving intoxicated individuals, there are compliance checks to confirm licensees are properly checking identification, and the LCB can establish Alcohol Impact Areas. 3/21/6 at 2:11 p.m.
 - If the LCB thought that the direct-to-retailers legislation, SB 6823, would create consumption problems, the LCB would have told the Legislature, which it did not, even though Lee had said at the summary judgment stage that prices would fall significantly because there would be only one mark-up if out-of-state suppliers sold directly to retailers. 3/21/6 at 3:11; 3:17 p.m.
 - There will be no mandatory three-tier system in Washington once SB 6823 becomes effective, despite the defendants' previous argument that such a system made the other restraints necessary.
 - The LCB determined that price was not an effective tool to address abusive consumption in Alcohol Impact Areas. 3/21/6 at 2:21 p.m.
3. The State's actions are inconsistent with the alleged goal of reducing consumption or abusive consumption.
 - The State has 313 state liquor stores in order to make alcohol available, including spirits, as conveniently as possible to consumers. 3/21/6 at 2:26 p.m.

1 • Lee confirmed that abuse-control restrictions imposed in Alcohol Impact Areas apply
2 equally to private retailers and the state stores, but did not explain why the state stores
3 need not abide by the restraints. 3/21/6 at 2:19 p.m.
4

5 • Before 2006, LCB had allowed distributors and retailers to sell Flavored Malt
6 Beverages, which contain spirits, even though the Liquor Act defines "Spirits" as
7 beverages containing any distilled spirits and even though such beverages are to be
8 sold only in state liquor stores. 3/21/6 at 2:29 p.m.
9

10 4. Restraints are not used or needed for tax generation or collection.
11

12 • The LCB has no reason to think that retailer reporting of purchases from out-of-state
13 producers will be insufficient to ensure tax collection. 3/21/6 at 3:12 p.m.
14

15 • If the LCB were unable to collect taxes as a result of SB 6823 it would have told the
16 Legislature, which it did not. 3/21/6 at 3:17 p.m.
17

18 • Because the LCB requires volume to be recorded in the separate label approval
19 process and product code assignment, it could still collect the gallon/liter tax
20 effectively even without the price post-and-hold system. 3/21/6 at 3:06 p.m.
21

22 5. Restraints are not applied or supervised with the purpose of affecting consumption.
23

24 • The LCB receives up to 250,000 price postings monthly, and even in the limited AIA
25 areas has determined that it is unworkable to scrutinize individual prices for their
26 effect on consumption.
27

28 • LCB does not review the prices that are posted unless the computer system identifies
29 a problem or the LCB receives a complaint. 3/21/6 at 2:41 p.m.
30

31 • LCB does not know if the supplier's posted cost includes the required minimum 10%
32 mark-up because the suppliers do not post their production costs. 3/21/6 at 2:35 p.m.
33

34 • The minimum mark-up does not apply to products denominated as close-outs.
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36 • Within at least the last four years, LCB has not investigated a supplier's posted price
37 to determine if it included the mandatory minimum 10% mark-up. 3/21/6 at 2:35
38 p.m.
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- Most of the complaints received about postings are from one distributor about another.
- Neither the LCB nor the Legislature considered whether the bill, SB 6737, that ended advance disclosure of price postings would reduce prices or stimulate consumption.
- The LCB has not studied the effects on consumption if the challenged restraints were removed. 3/21/6 at 2:43 p.m.

6. Overconsumption of wine and beer is not an identified state problem.

- The LCB has no evidence of overconsumption of alcohol in Washington, except for Alcohol Impact Areas and underage drinking. 3/21/6 at 2:43 p.m.
- The LCB has not studied the effects of the State stores' sales practices on consumption. 3/21/6 at 2:43 p.m.
- The LCB has not done any study that would suggest consumption or abuse would increase without the restraints.

7. The LCB does not know if alternatives could equally or even more effectively achieve state goals.

- The LCB has never studied alternatives to the restraints, even knowing that they were under challenge and though there is no reason to believe that alternatives would not work as well. 3/21/6 at 3:04 p.m.
- State has not studied Washington's system in relation to other state regulatory systems. 3/21/6 at 3:04 p.m.

8. The restraints were not intended to protect small retailers. 3/21/6 at 2:45 p.m.

9. The restraints do not accomplish uniformity of retail prices. 3/21/6 at 2:34 p.m. Any uniformity at the distributor level is only within the "service area," which is set by private contract, and there is no requirement of uniformity at the retail level. Historically, there is greater price variation among retailers than among distributors.

Randy Reynolds, MIW enforcement director

1. The State's actions are inconsistent with the alleged goal of reducing consumption or abusive consumption.

- The State does not closely regulate beer even when it contains spirits and even when state law required stricter control. 3/21/6 at 3:45 p.m. (LCB allowed private retailers to sell flavored malt beverages, which contain at least 51% malt base with up to 49% distilled spirits, even before law was changed).

William Rorabaugh, historian

1. The intent of the original Steele Act was to treat wine and beer differently than spirits and not to artificially reduce consumption of wine and beer.

- Washington's concern during Prohibition was with spirits (Canadian whiskey) and not wine and beer. 3/22/6 at 9:45 a.m.
- From its inception, the Steele Act treated beer and wine differently from spirits. The regulatory system sought to ensure access to lower priced wine and beer as a means to promote temperance and persuade consumers not to drink spirits. 3/22/6 at 10:00 a.m.
- There was no goal to limit the number of off-premise licenses in Washington, only the number of on-premises. 3/22/6 at 10:56 a.m.
- The federal government legalized beer nationwide in March 1933, even before the Steele Act was adopted; any concern with beer was only with "free beer."
- The State took the view that wine and beer are to be preferred to spirits. 3/22/6 at 11:13 a.m.
- The LCB annual reports in the 1930s differentiated between spirits and wine and beer. 3/22/6 at 11:14 a.m.
- The 1933 Washington Report of State Advisory Liquor Control Commission, states that "true temperance is best promoted by making widely available intoxicating beverages of low alcoholic content such as beer and light wines, but limiting so far as humanly possible the promotion of the sale of intoxicants of heavy alcoholic content though making them obtainable in Government dispensaries." 3/22/6 at 11:14 a.m.
- The State intended to use the licensed retail sale of wine and beer as a means of decreasing consumption of spirits or "heavy liquors." 3/22/6 at 11:25 a.m.

- 1 • A premise of Prohibition was that the abuses of the minority of people should not
2 deny benefits to the law-abiding population.
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5 • The Rockefeller-funded Fosdick report, which was very influential in Washington's
6 formulation of its regulatory approach, states:
7
8 1) "But while hundreds of thousands of people are by preference and practice
9 teetotalers, public opinion will not support the theses that the temperate use of alcohol
10 is inconsistent with sobriety, self-control, good citizenship and social responsibility.
11 More than that, many people believe that such moderate use can be made an
12 agreeable phase of a civilized mode of living."
13
14 2) "Public opinion is gratified by the record of sobriety that has attended the return of
15 beer [in March 1933]. It is distinctly apprehensive over the prospective legalized
16 return of spirits."
17
18 3) "The experience of every country supports the idea that light wines and beers do
19 not constitute a serious social problem."
20
21 4) "Education in its broadest sense has a greater part to play in creating a sober
22 nation than has legislative enactment. Temperance lies in the character, standards and
23 self-discipline of individual men and women. Education is a slow process, but it
24 carries a heavier share of the burden of social control than does legal coercion."
25
26 5) "A rational approach to the problem of liquor control requires an about-face and a
27 new viewpoint. We should start by inquiring what concentration of alcohol makes a
28 beverage intoxicating in fact t ordinary man. When the alcoholic content is below
29 that point, a drink should be subject to little, if any, restraint upon its use. The sale of
30 stronger drinks should be regulated under a program which, so far as is practicable,
31 discourages consumption with increasing strictness as the alcoholic content increases.
32 Such a system directs its spear-head against alcohol in the forms most liable to abuse
33 by man, and, by permitting relative freedom in the use of the weaker drinks, tends to
34 promote temperance. Where shall the line be drawn in setting up such a plan of
35 control? A natural and convenient division is between fermented beverages and
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1 distilled liquors. The fermented drinks, consisting mainly of beers and wines, have a
2 range of alcoholic content up to 12 per cent. Distilled liquors, which include whiskey
3 and gin, usually contain from 30 to 45 per cent of alcohol."
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6 6) "But we find no definite evidence to support the theory that satisfying a taste for
7 beer develops a craving for whiskey. On the contrary, we believe that if beers and
8 wines are more easily obtainable than distilled liquors, and are sold in different places
9 and under different conditions, there is reasonable ground to expect that the taste of
10 those who wish to drink will be diverted to the lighter and less harmful beverages."
11

12 7) "Wine naturally fermented—not in excess of, say, 10 to 12 per cent [by weight]—
13 should be sold by the bottle for off-premises consumption as freely as 3.2 per cent
14 beer."
15

16 8) "It is because we believe that the whole temperance movement will be materially
17 helped if the sale of beverages of low alcoholic content is liberalized that we have
18 been led to the recommendations contained in this chapter."
19

20 9) "From our point of view, however, there is no reason for an artificial restriction on
21 light beers and light wines through the medium of price control. This is, however,
22 desirable for the heavier alcoholic beverages."
23

24 10) "Our recommendation in regard to the liberalization of the control of light beers
25 and wines may seem to some too extreme a concession to wet sentiment. We are
26 convinced, however, that without this degree of liberalization there is no escape from
27 the bootlegger and but little hope for real temperance." 3/22/6 at 11:15-11:30 a.m.
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40 • The follow-up Rockefeller-funded report by Leonard Harrison and Elizabeth Laine,
41 titled "After Repeal," which was one of the source principally relied upon by
42 Rorabaugh, states:
43

44 1) "In the case of taxation on light wines and beers the difficulties in respect to
45 consumption and bootlegging are relatively slight. Here we find that pure revenue
46 motive in taxation stripped of any complicating factors. If the preprohibition rates on
47 wines and light beer had been reinstated, the cause of temperance might have been
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1 furthered. Actually, the tax burden is so heavy that it keeps down the consumption of
2 the lighter alcoholic beverages. Instead of reducing the total use of alcohol, high
3 taxes on light beverages encourage the consumption of the more highly concentrated
4 alcoholic liquors. A decrease in taxes on all beverages would best solve the problem
5 of defeating the bootlegger and would increase the total revenue by displacing illicit
6 liquor with taxed products; decreased taxes particularly on light beverages would
7 contribute to the promotion of temperance."
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14 2) "Another innovation in on-premises sales arrangements is the separate and more
15 liberal licensing of beer. The purpose of this is to promote temperance. The
16 liberality is based on the recognition of the relatively greater danger inherent in the
17 use of spirits and other liquors of high alcoholic content."
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21 3) "Another theoretical advantage of state monopoly is that it is in a position to favor
22 the sale of natural light wines. They can do this by selling wine at a lower margin of
23 profit than whisky, gin, and rum. But monopolies have generally failed to take
24 advantage of this opportunity. The state of Washington is a notable exception.
25 Domestic wines, purchased in bulk and bottled by the monopoly, are there being sold
26 for one dollar a gallon. According to Admiral Gregory, chairman of the Washington
27 Liquor Control Board, "cheap wine meets the need of those who prefer wine to
28 whisky but who cannot afford to pay the usual wines prices." 3/22/6.
29

- 30 • Norman Clark's authoritative book "The Dry Years," which Rorabaugh relied upon,
31 notes:
32

33 1) That after repeal Washington allowed hotels and taverns to sell beer and wine by
34 the glass but that there was to be absolutely no public consumption of hard liquor and
35 no saloons. In addition, grocery stores could sell packaged beer and wine for off-
36 premise consumption, but that only the State stores could sell packaged hard liquors.
37

38 2) A "report, written by Alfred J. Schweppe, former dean of the University of
39 Washington law School, attempted a careful definition of modern temperance: 'Your
40 Commission in approaching the problems of liquor control has accepted as
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1 substantially sound, the view that the solution of the question is not prohibition,
2 which has prove a complete failure, and it is not the open saloon, to the return of
3 which public opinion is strongly opposed, but that true temperance is best promoted
4 by making widely available intoxicating beverages of low alcoholic content such as
5 beer and light wines, but limiting so far as humanly possible the promotion of the sale
6 of intoxicants of heavy alcoholic content through making them available in
7 Government dispensaries."

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14 3) In describing Washington's State liquor stores, he noted that "[s]elf service stores
15 made monopoly more attractive, and colorful 'specialty tables' encouraged customers
16 to feel that a more cosmopolitan and at least a pseudo free-enterprise sort of
17 marketing was possible. In the sale of California and European wines, there might
18 actually be competition among grocery stores, the new wine stores, and the monopoly
19 stores. Inventories changed quickly in reaction to national trends, especially to the
20 increasing popularity of light wines and vodka, and there were even occasional LCB
21 'sales.' No one seemed to find it odd that the LCB, in apparent contradiction to its
22 original mandates to promote 'temperance,' might be vigorously engaged in what it
23 called 'merchandising.'" 3/22/6 at 11:36-11:47 a.m.

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32 • Washington has moved well beyond the prohibition on spirits by the drink in public
33 places, a policy central to the Steele Act. Prof. Rorabaugh did not explain why the
34 restraints, mostly unmentioned in the Steele Act, managed to survive so long.

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38 2. The post-Prohibition intent was to reduce spirits prices to combat bootleggers but in
39 subsequent years to raise prices to generate revenue for the State but not to reduce consumption.

- 40
41 • The main problem with bootleggers was with spirits. 3/22/6 at 11:33 a.m.
- 42
43 • The State's initial concern was to keep prices charged for alcohol low so as to reduce
44 illegal production. 3/22/6 at 10:00 a.m.
- 45
46 • It was not the State's purpose to raise prices in order to reduce consumption. 3/22/6 at
47 11:20-11:47 a.m.
- 48
49 • When prices and taxes were raised it was to generate revenue. 3/22/6.
- 50
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- 1 3. The State did not intend to use wine and beer prices to reduce consumption.
2
3 • In the 1930s, the LCB did not expect the restraints to increase the prices of alcoholic
4 beverages. "That is really not their concern; reports do not address price." 3/22/6 at
5 10:03 a.m.
6
7 • "Documents [from the 1930s that Rorabaugh reviewed in the course of preparing his
8 report] do not discuss price in any detail." 3/22/6 at 11:47 a.m.
9
10 • Washington is complimented for keeping prices of beer and wine low by authoritative
11 researchers at the time in the Rockefeller-funded follow-up study, "After Repeal."
12 3/22/6 at 11:32 a.m.
13
14 • In addition, "After Repeal" stated: "[a]pparently, monopoly administrators have been
15 little concerned with increases in consumption that result from low prices. We know
16 of no instance when prices have been raised and law-enforcement activities increased
17 in order to restrict consumption." 3/22/6.
18
19 • The California Wine Bill significantly reduced prices to consumers and increased
20 wine consumption but those were not identified as problems by the Legislature or
21 public.
22
23 4. Wholesalers were not seen as a means to prevent tied houses.
24
25 • "After Repeal" notes that: "[t]he private wholesaler and the wholesaler-rectifier are
26 eliminated in monopoly states. Generally speaking it is the unscrupulous wholesaler
27 and rectifier and not the leading manufacturers who give the most trouble in the
28 liquor business... We believe that the fewer dealers in the liquor business between
29 manufacturer and retailer the better conditions of sale will be." 3/22/6.
30
31 • Distributors were not thought immune from the temptations of profit motives.
32
33 • The restraints are separate from the three-tier system requirement, and most of the
34 restraints are not directed at limiting control by suppliers of retailers.
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36 • Only excessive credit was thought to be a problem in the 1930s, and federal
37 restrictions required reasonable and common credit terms.
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1 5. The early reports relied upon by Prof. Rorabaugh make no reference to central
2 warehousing, delivered pricing, or retailer-to-retailer sales.
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5 **Lance Kahn, owner of Jennings Distribution**
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7 1. Restraints produce inefficiencies, are unnecessary, and hurt consumers.
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- 9
 - 10 • Jennings does not like to post prices because it is time-consuming and inhibits its
11 ability to manage its inventory in an efficient way. 3/22/6 at 1:56 p.m.
 - 12 • Minimum mark-up requirement has no impact on Jennings' pricing or business
13 decisions. 3/22/6 at 2:16 p.m.
 - 14 • The restraints force distributors to destroy product that is nearing its expiration date
15 and inhibit the efficient management of inventory. 3/22/6 at 2:17 p.m.
 - 16 • Jennings would offer discounts to customers if permitted. 3/22/6 at 2:13 p.m.

17 2. The restraints result in a transfer of wealth to distributors.
18

- 19
 - 20 • Jennings claims its average gross margin on beer is 26%. Jennings has an even larger
21 margin on imported beers. 3/22/6 at 3:17 p.m.
 - 22 • For a "bread and butter" product, cases of four six-packs of 12-ounce cans of Coors,
23 Jennings mark-up over its acquisition cost was well above the minimum mark-up--
24 44.6% in March 2003 and 44.1% in March 2005. 3/22/6 at 3:11-3:15 p.m.

25 3. The State allows, and the mark-ups fund, promotional activity and services that stimulate
26 consumption.
27

- 28
 - 29 • Much of Jennings' distribution costs are extra personnel to reset product displays.
30 3/22/6 at 1:44 p.m.
 - 31 • Distributors provide retailers with point of sale materials, including banners, posters,
32 neon signs, shelving and display schematics. These items may either be generated by
33 the supplier or the distributor. If generated by the distributor, the distributor pays for
34 the promotional item. In either case, the distributor pays the cost for its employee to
35 go to the retailer and set up the promotional material. This is funded by the
36 distributor's mark-up. 3/22/6 at 3:26-3:32 p.m.

- Distributors contribute money for media to suppliers, or suppliers will include advertising money as a separate line item on the invoice to the distributor. This money comes from the distributor's mark-up and goes to product advertising. 3/22/6 at 3:33-3:34 p.m.

4. Distributors are able to use the surplus they receive from the restraints to oppose measures that might reduce consumption or abuse.

- WBWWA has consistently opposed the beer tax. 3/22/6 at 2:47 p.m.

5. The State's actions are inconsistent with the alleged goal of reducing beer and wine consumption.

- Although the State just recently enacted law permitting private retailers to sell flavored malt beverages that contain distilled spirits, LCB had allowed this practice for several years. 3/22/6 at 3:36-3:37 p.m.

Merritt Long, Board chair and defendant (including deposition designations)

1. It is not state policy to reduce consumption of wine and beer.

- The LCB is not trying to reduce overall consumption. Dep. 83:5-11, 23-24. The LCB does not believe reducing consumption is realistic and recognizes that this was not the intent of the authors of Steele Act. 3/22/6 at 3:47-48 p.m.; 3/23/6 at 9:15 a.m. (specifically wine and beer).
- Part of the LCB's mission is revenue generation through sales and taxes. 3/22/6 at 3:49 p.m.; 3/23/6 at 9:12 a.m. It is the intent of the LCB to maximize sales and revenues as long as it can be done without too many negative effects. 15:11-14.
- When asked to explain how the challenged restraints prevent overconsumption, all Long stated was that the total system of "interlocking controls" results in "orderly distribution."
- The LCB is "not in the business of exclusively specifically looking at price as the component of the control system to deal with overconsumption or underage consumption." 172:20-22.

- 1 • If overall consumption increased and abusive consumption remained at an acceptable
2 level this would be an even better balance of the LCB's interests. 84:7-11.
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4 • When explaining why the State's three-tier system works, Long did not mention
5 reduction of use or increasing prices so as to decrease consumption. Dep. 128:3-10.
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8 2. The State's actions are inconsistent with the alleged goal of reducing beer and wine
9 consumption.
10
11 • The Legislature authorized twenty state liquor stores and all contract stores to be open
12 on Sunday during a pilot program. One purpose for extending the days of operation
13 was revenue generation. 3/22/6 at 3:55 p.m.; Dep 7:9-10.
14
15 • One policy reason for allowing Sunday sales was to raise revenue, which would result
16 in more total sales of spirits. 8:8-14. Sunday sales are projected to result in new net
17 sales of \$7 million for 20 stores over 2 years. As a result of Sunday sales,
18 consumption would increase because people are buying more spirits. The LCB never
19 told the Legislature that increased consumption due to Sunday sales would be adverse
20 to any state policy. 3/23/6 at 9:34-9:35 a.m.
21
22 • Consumption rates in Washington from 1994-2004 have increased faster than the
23 State's growth in population. 3/23/6 at 9:51 a.m.
24
25 • Recently, the LCB reported over \$700 million in total revenue this year, which is up
26 6% over the prior year while the population of Washington had only increased about
27 1-2% percent. The increased revenue was due to growth of the state store retail
28 operation and improved merchandising of products in stores. 3/23/6 at 9:23 a.m.,
29 9:27 a.m.
30
31 • The LCB has not examined whether increasing the total consumption of spirits would
32 increase abusive or excessive consumption. Dep. 8:15-18.
33
34 • The concern with overconsumption is best addressed at the point of sale. Dep. 17:4-
35 19. However, there is no limit on the quantity of alcohol that may be purchased by a
36 consumer if they are of age and are not inebriated. Dep. 19:6-10.
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- The LCB is proud of the fact that it can take advantage of credit terms to lower the cost of goods sold at the State liquor stores. Lowering the cost of goods sold allows the State liquor stores to sell to consumers at lower prices. Dep. 31:10-22.
 - State liquor stores obtain quantity discounts in their purchases and give quantity discounts to consumers. 40:25-41:5.
 - The LCB has implemented a new shelf arrangement plan at the State liquor stores to increase sales. Dep. 61:12-19.
 - The LCB does not view its goal to average an 8% annual revenue increase during the next decade as inconsistent with controlling abusive consumption. Dep. 67:17-19; 68:14-18.
 - The LCB is trying to increase revenue to the State by increasing sales at state liquor stores or through taxes. Dep. 84:4-6.
 - The LCB has not considered what effect spirits pricing has on abusive consumption. Dep. 169:4-7.
 - Other than analysis in the Tacoma Alcohol Impact Area, the LCB has not analyzed whether people who abuse alcohol tend to abuse cheaper brands as opposed to more expensive brands. Dep. 172:4-11.
 - State contract stores earn 6-12% commission from the LCB on their sales. 3/23/6 at 9:23 a.m.
 - The LCB measures the performance of state stores by, among other things, sales per square foot. It is viewed as a positive if sales per square foot increase. The state and contract liquor stores know that their performance is being measured in this and other ways. 3/23/6 at 9:25-9:27 a.m.
3. The restraints are unnecessary to prevent and not directed at the misuse of alcohol.
- Long did not identify the restraints as a method of preventing the misuse of alcohol. The LCB balances its mission in generating revenue with its responsibility to prevent the misuse of alcohol by instituting mandatory service training, participating in

1 programs aimed at reducing underage drinking, performing community policing, and
2 conducting retailer compliance checks. 3/22/6 at 3:49-3:53 p.m.

- 3 • The restraints are not necessary to promote moderation. Long identified ways to
4 promote moderation, without mentioning the restraints, as public education programs,
5 restraints on minors, and educating servers of alcohol. 3/23/6 at 9:16 a.m.
- 6 • The LCB does not review retailer pricing for reasonableness. Dep. 21:1-15.
- 7 • The LCB has not studied whether the 10% minimum markup is the right amount.
8 Dep. 22:5-18.
- 9 • The LCB and the State decided to reduce costs and increase access to consumers at
10 the state liquor stores. Dep. 28:24-29:7.
- 11 • Private retailers, just like the state liquor stores, could get quantity discounts, obtain
12 credit terms and buy directly from out-of-state manufacturers as long as the
13 magnitude of those actions did not cause problems with abusive consumption. Dep.
14 41:20-42:16; 44:25-45:22.
- 15 • The LCB does not know how far below the level of too much abusive consumption
16 Washington currently is, and the LCB does not know whether eliminating the
17 restraints would push Washington over the point at which there is too much abusive
18 consumption. There is no metric by which the LCB has measured the extent of
19 negative effects of consumption in Washington. Dep. 34:25-37:5, 10-18.

20 4. The State cannot prove that alternatives to the restraints would be ineffective.

- 21 • The LCB cannot say that Washington's efficiency at collecting taxes would be worse
22 without the challenged restraints. 3/23/6 at 9:33 a.m.
- 23 • The LCB has not examined other states that do not have the challenged restraints to
24 see how they operate. 3/23/6 at 9:31 a.m.

25 5. Permitting retailers to centrally warehouse would be simple to regulate.

- 26 • The LCB runs its own central warehouse.
- 27 • If the State allowed Costco to have a warehouse, it could regulate just like it regulates
28 distributor warehouses. 3/23/6 at 9:30 a.m.

- The LCB and suppliers use the same private carriers that a retailer would use if allowed. No special precautions are taken. 3/23/6 at 9:28-9:29 a.m.

6. Retailer efficiency is good and does not result in the negative effects associated with alcohol.

- The LCB does not view its goal of efficiently re-supplying its State liquor stores and contract stores as inconsistent with controlling abusive consumption. Dep. 71:2-14.
- It is good for private retailers to be more efficient in their re-supply. Dep. 71:21-24.
- Innovative business practices for private retailers are a good thing and do not result in the negative effects of alcohol. Dep. 72:14-19.
- Quickly changing to market conditions is not inconsistent with avoidance of the negative aspects of alcohol consumption. Dep. 81:17-23.

Randy Simmons, tax audit director

1. The restraints are unnecessary for efficient tax collection.

- LCB enforcement staff, which audits suppliers and distributors, does not use the price posting function in their auditing function. 3/23/6 at 10:22 a.m.
- The restraints do not affect the LCB's collection of taxes. 3/23/6 at 10:57 a.m.
- In its audits of distributors and other taxpayers the LCB has not sought reconciliation from retailers (even though some producers sell directly to retailers), and removal of the ban on retailer-to-retailer sales would not preclude effective tax collection. LCB has no plans to audit retailers even under the new direct-to-retailer law. 3/23/6 at 10:10-10:11 a.m.
- In 2000, the LCB eliminated 100% annual tax audits of wholesalers and other taxpayers and mandatory surety bonds to secure tax collections. 3/23/6 at 10:34 a.m.
- The 30-day hold, uniform pricing, and delivered pricing requirements do not affect tax collection.
- The quantity discount, credit, and central warehousing bans do not affect tax collection.

1 2. No apparent state policy exists to reduce consumption by increasing cost to consumers of
2 wine and beer.
3

- 4 • Mr. Simmons would know if the agency or Legislature had considered raising the
5 beer or wine tax to reduce consumption and is not aware of any such proposal having
6 been made. 3/23/6 at 10:32 a.m.
7
- 8 • A portion of the wine taxes go to the Washington Wine Commission to promote
9 Washington wine and its consumption. 3/23/6 at 10:33 a.m.
10

11 **Craig Stein, distributor**

12 1. The restraints are mostly applicable between distributors and retailers, not retailers to
13 consumers or suppliers to distributors.
14

- 15 • Suppliers can give credit terms to distributors. Suppliers may choose to sell to
16 distributors on a FOB or delivered basis. Suppliers can offer distributors a purchase
17 allowance, depletion allowance, or other allowance to promote their product, and
18 some allowances are tantamount to a month-end rebate based on sales. 3/23/6 at
19 11:53-11:55 a.m.
20

21 2. The restraints subsidize convenience stores and other small retailers.
22

- 23 • Stein Distributing's average delivery cost per retail account is \$3-4 per case, and it
24 needs to deliver 25 cases to an account to break even. 3/23/6 at 11:13-11:14 a.m.
25
- 26 • Due to the uniform pricing and delivered pricing restraints, a distributor's profitable
27 accounts, which are larger or in closer proximity, subsidize its unprofitable accounts,
28 which are smaller or located farther away. 3/23/6 at 11:39 a.m.
29
- 30 • Costco and other closer, larger accounts are subsidizing Stein Distributing's smaller,
31 unprofitable accounts. 3/23/6 at 11:40 a.m.
32

33 3. The restraints result in a transfer of wealth to distributors.
34

- 35 • Stein Distributing's claimed profit margin is 22% for wine and 25.5-26% for beer.
36 3/23/6 at 11:22 a.m.
37
- 38 • For a high-selling product, cases of four six-packs of 12-ounce cans of Coors, Stein
39 Distributing's mark-up above its acquisition cost was 44.7% in March 2004. For
40

1 another Coors product on which it took a "post-off" (or temporarily lowered its price)
2
3 in March 2004, its mark-up was 38.2%. Each was "amply above the 10% threshold"
4
5 of the minimum mark-up restraint. 3/23/6 at 1:58-2:03 p.m.
6

7 4. The State allows, and the mark-ups fund, promotional activity and services that stimulate
8 consumption.
9

- 10 • Distributors provide point of sale materials (sometime at the expense of the supplier
11 or distributor) to retailers and set up displays. Distributors pay, from their gross
12 margin, the costs of the persons who provide these promotional services. 3/23/9 at
13 12:02-12:03 p.m.
14
- 15 • In addition, distributors can provide retailers with promotional cooler stickers,
16 posters, white/black boards, circular "bull's-eye" advertisements, promotional
17 mobiles, window displays, table tents, and inserts, all of which may be paid for by the
18 distributor or supplier. The labor cost is paid by the distributor from its profit margin.
19 However, the State does not permit distributors to provide retailers with coasters or
20 umbrellas because they have intrinsic value. 3/23/6 at 1:41-1:45 p.m.
21
- 22 • The LCB allows distributors to engage in certain "interactive" promotions in bars and
23 other retail premises. 3/23/6.
24
25
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33 **Jeanne Reschan, enforcement officer**

34 1. Price posting is not necessary to ensure enforcement of retail-level controls on abusive
35 consumption or efficient tax collection.
36

- 37 • Enforcement regarding below cost sales at retail is effective without relying on price
38 postings (because there are none at the retail level). 3/23/6 at 2:48 p.m.
39
- 40 • Oregon is able to enforce its laws, even though its price-posting restraint was
41 invalidated, by requiring that suppliers and distributors keep all purchase and sales
42 records on site for enforcement to check. 3/23/6 at 2:49 p.m.
43
- 44 • The LCB could achieve the same objectives if suppliers and distributors post their
45 prices only to the state without those prices being open to view by competing
46 suppliers and distributors and without the hold requirement. 3/23/6 at 2:45 p.m.
47
48
49
50
51

1 **Steve Burnell, LCB wine manager**

- 2
- 3 1. The State's actions are inconsistent with the alleged goal of reducing wine consumption
- 4
- 5 • LCB stores seek better wine merchandising and better signage, and pursue other
- 6 actions that might sell more wine. 3/23/6 at 3:42 p.m.
- 7
- 8 • The State liquor stores advertise the price per liter for their products in the stores and
- 9 on the LCB website. 3/26/6 at 3:55 p.m.
- 10
- 11 2. Restraints not applicable to State
- 12
- 13 • The LCB liquor stores can sell products below cost in certain circumstances. 3/23/6
- 14 at 3:48 p.m.
- 15

16 DATED: March 28, 2006.

17

18

19

20 s/ David J. Burman, WSBA # 10611

21 Shylah R. Alfonso, WSBA #33138

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DECLARATION OF SERVICE

I declare that on March 28, 2006, I caused to be served upon counsel of record, listed below, via efileing, a true and correct copy of the foregoing Costco's Summary of Testimony in First Week of Trial to the following:

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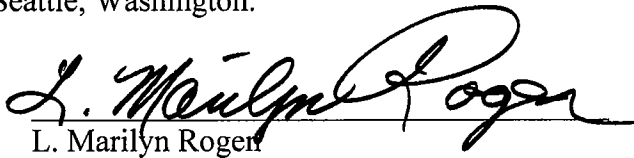
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Merritt Long

Attorneys for Intervenor Defendant
Washington Beer and Wine Wholesalers
Association

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: March 28, 2006 at Seattle, Washington.


L. Marilyn Rogen

Other Documents2:04-cv-00360-MJP Costco Wholesale Corporation v. Maleng et al**U.S. District Court****WESTERN DISTRICT OF WASHINGTON**

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The following transaction was received from Burman, David entered on 3/28/2006 at 9:33 AM PST and filed on 3/28/2006

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Case Number: 2:04-cv-360

Filer: Costco Wholesale Corporation

Document Number: 135

Docket Text:

STATEMENT *Costco's Summary of Testimony in First Week of Trial* by Plaintiff Costco Wholesale Corporation. (Burman, David)

The following document(s) are associated with this transaction:

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